In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1163

EDGAR FORREST CRITZER
AND
ROBERT W. CRITZER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their intercepted conversations should have been suppressed because (1) the informant who participated in the conversations did not voluntarily consent to the electronic interception and (2) a search warrant was required to conduct the surveillance.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner Edgar Critzer was convicted of impersonating a federal officer, in violation of 18 U.S.C. 912 and 2, and of conspiracy to defraud, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three and five years' imprisonment, respectively. After a separate jury trial in the same court, petitioner Robert Critzer was convicted of aiding and abetting the impersonation of a federal officer, in violation of 18 U.S.C. 2 and 912, and of conspiracy to

defraud, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment on the aiding and abetting conviction; one year of that sentence was suspended pursuant to 18 U.S.C. 3651, and he was ordered confined to a penal institution for six months. The imposition of sentence on the conspiracy count was suspended, and he was placed on probation for a term of three years. As a condition of probation, he was required to repay the victim at least one-half of the sum defrauded.[1] The court of appeals affirmed petitioners' convictions without opinion (Pet. App. 16).

1. The evidence at petitioner Edgar Critzer's trial showed that petitioners and Grady Wortham drove from Afton to Ashland, Virginia, in April of 1972 (Tr. 21-22).[2] When they arrived in Ashland, petitioner Edgar Critzer obtained a list of names and then entered a telephone booth to call the persons listed (Tr. 23-24).

At approximately 10:00 a.m. on April 19, 1972, Mrs. Eugene Delarue received a telephone call from a person who identified himself as Mr. Wilson, a federal employee (Tr. 6). The man told Mrs. Delarue that he was conducting an audit at her bank and needed to know the amount of her savings account (Tr. 6-7). Mrs. Delarue supplied the requested information (Tr. 7). Later the same day, Mrs. Delarue received a second call from the man identifying himself as Mr. Wilson, a federal employee. In this conversation, he asked her if she knew that two bank employees were stealing her money, and that they had already taken

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[1]Co-conspirator Grady Wortham pleaded guilty to the charge of aiding and abetting the impersonation of a federal officer. He was sentenced to three years' imprisonment, suspended, and he was placed on probation for five years. Restitution was also a condition of his probation.

[2]On appeal, counsel for the parties stipulated that the transcript of Robert Critzer's trial was unnecessary because the proceedings at Edgar Critzer's trial were substantially similar for purposes of the issues raised. We therefore summarize only the evidence at Edgar Critzer's trial. "Tr." refers to the transcript of that trial. "H. Tr." refers to the transcript of the hearing on petitioners' motion to suppress evidence.

about one-half of her savings (Tr. 7). Still later, petitioner Edgar Critzer called Mrs. Delarue again (Tr. 25). He told her to withdraw $2,500 from her bank account and that he would take care of the money and place it in a vault (Tr. 8-9). He also asked Mrs. Delarue not to say anything to anyone about the transaction (Tr. 9). After that call, Edgar Critzer told Wortham and Robert Critzer that Mrs. Delarue was going to the bank (Tr. 27). The three men drove to Mrs. Delarue's house and followed her to the bank (*ibid.*). When she arrived there, Robert Critzer entered the bank to determine whether she was withdrawing the money (Tr. 28). Mrs. Delarue withdrew the $2,500 and returned to her home (Tr. 9).

Petitioners and Wortham thereupon returned to the telephone booth, and Edgar Critzer again called Mrs. Delarue. He told her that a man named Mr. Martin would pick up the money (Tr. 9-10). Wortham and Robert Critzer then went to Mrs. Delarue's house; Wortham entered the house and identified himself as Mr. Martin. He was given the money, and he supplied a receipt (Tr. 10-11, 29, 31-32). He left the house, met with petitioners, and they divided the money (Tr. 33).

2. On February 6, 1974, Wortham was arrested by FBI agents pursuant to an arrest warrant (H. Tr. 23-24). At that time he was asked if he would aid in the investigation of the fraud (H. Tr. 51-52). Wortham told the agents that he "would have to think about it" (*ibid.*). On February 14, 1974, in light of information previously supplied by Wortham, FBI Agent Charles Evans informed Wortham that the FBI wished to record his conversations with petitioners (H. Tr. 17). Wortham was advised that he had no obligation to aid the FBI and that he had a constitutional right not to cooperate (H. Tr. 17). No threats or promises were made, and there was no suggestion that his own case would be affected in any way by his cooperation (H.

Tr. 17, 40-41, 52-53). Wortham consented to the electronic surveillance because he knew the government had evidence incriminating him and believed that his cooperation might be to his benefit (Tr. 41).

Transmitters were subsequently placed on Wortham's person and in the dashboard of his car (H. Tr. 13-14). Prior to each monitored conversation, Wortham was advised of his constitutional rights, including his right to counsel, and was told that he had no obligation to aid the FBI (H. Tr. 17, 37). Wortham signed written waivers stating that he understood his rights and desired to cooperate (H. Tr. 17). Throughout the investigation, Wortham stated that he did not desire an attorney (H. Tr. 37).

On March 21 and March 23, 1974, Wortham initiated conversations with Robert Critzer (H. Tr. 25-26, 29). The conversations occurred in Wortham's automobile in a parking lot in Stuart's Draft, Virginia (H. Tr. 15-17). On March 28, 1974, Wortham initiated a conversation with Edgar Critzer in Waynesboro, Virginia (H. Tr. 29-30). Each of the conversations was recorded and admitted into evidence at petitioners' respective trials (H. Tr. 14).

3. Petitioners contend (Pet. 7-9) that the intercepted conversations should have been suppressed because Wortham's consent to the surveillance was involuntary. According to petitioners, Wortham was coerced by the thought that his assistance to the investigation would work to his benefit in a future prosecution. There is no merit to this claim.

Nothing in the record indicates even the most subtle coercive tactics on the part of the government. No threats or promises were made to Wortham, he was not told that his consent to the surveillance would help him, and he was repeatedly advised of his constitutional rights. He was

specifically warned that he had a right not to cooperate (H. Tr. 17). Absent any indication of coercion on the part of the government, the giving of such a warning—which goes far beyond what this Court has required in analogous situations (see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 231-233)—demonstrates beyond any doubt that Wortham's consent was voluntary.[3] Moreover, Wortham himself considered his consent to be voluntary (H. Tr. 40). In sum, the district court properly determined as a fact "from the totality of all the circumstances" that Wortham's consent was "voluntary." *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227.

Moreover, while Wortham may well have hoped that his cooperation would redound to his benefit—and while it may indeed ultimately have done so—there is nothing improper about this and his consent is in no way rendered involuntary thereby. In sum, the court of appeals found no reason to disturb the district court's voluntariness finding, and, we submit, there is none.

4. Petitioners also urge (Pet. 9-12) that the intercepted conversations should have been suppressed because no search warrant was obtained. It is settled, however, that when one party to a conversation consents to electronic surveillance, such an interception is lawful and no search warrant is required. *United States* v. *White*, 401 U.S. 745; *United States* v. *Santillo*, 507 F.2d 629 (C.A. 3); *United States* v. *Bonnano*, 487 F.2d 654, 657-658 (C.A. 2); *Holmes* v. *Burr*, 486 F.2d 55, 60 (C.A. 9), certiorari denied, 414 U.S. 1116; *United States* v. *Fanning*, 477 F.2d 45, 47-48 (C.A. 5), certiorari denied, 414 U.S. 1006. See 18 U.S.C. 2511 (2)(c).

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[3]In *Schneckloth* the Court said that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning" (412 U.S. at 231).

Petitioners urge that the situation presented by this case may be distinguished from this Court's prior decisions upholding warrantless consensual surveillance (Pet. 11)[4] because, after *Katz* v. *United States*, 389 U.S. 347, the touchstone is whether there was a constitutionally justifiable expectation of privacy, and, they say, such an expectation existed here. That claim is foreclosed, we submit, by this Court's decision in *United States* v. *White, supra*. See also *Hoffa* v. *United States*, 385 U.S. 293. While the surveillance in *White* occurred prior to the Court's opinion in *Katz*, the plurality opinion in *White* made clear that *Hoffa* "was left undisturbed by *Katz*" (401 U.S. at 749) and that there is no constitutionally protected expectation of privacy when one party to a conversation consents to electronic surveillance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]See *Lopez* v. *United States*, 373 U.S. 427; *On Lee* v. *United States*, 343 U.S. 747.